Thermatek Sdn Bhd v TM Global Marine Sdn Bhd (formerly known as Smart Work Co-ordinating Sdn Bhd)

COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02(ADM)(W)-1103–05 OF 2021
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
13 OCTOBER 2022

Contract — Performance — Performance from third person — Respondent and appellant entered charterparty — Appellant and third party entered charterparty — Third party failed to make payment to appellant — Appellant failed to make payment to respondent — Third party paid directly to respondent — Whether s 42 of Contracts Act 1950 applicable — Contracts Act 1950 s 42

Tort — Conspiracy — Conspiracy to injure — Respondent and appellant entered charterparty — Appellant and third party entered charterparty — Third party failed to make payment to appellant — Appellant failed to make payment to respondent — Third party entered into new charterparty with respondent — Whether there was tort of conspiracy to injure by lawful means

The respondent was the disponent owner of the vessels 'Toll Suralaya' and tugboat 'Whale 7' ('the vessels'). The respondent and the appellant had entered a charterparty ('the first charterparty') for the hire of the respondent's vessels. The appellant in turn entered another charterparty ('the second charterparty') with KP Port Services ('KPPS') for the hire of the same vessels by KPPS. The problem arose when the appellant failed to make the relevant payment to the respondent under the first charterparty which was primarily due to the failure of KPPS to make the relevant payment under the second charterparty to the appellant. After several meetings, the respondent, KPPS and the appellant had agreed to a split payment arrangement ('the tripartite agreement') whereby KPPS would pay directly to the respondent the monies owed by the appellant to the respondent and the remaining payment due under the second charterparty would be paid to the appellant. Based on the tripartite agreement, the respondent had received the full outstanding amount from KPPS ('the KPPS payment') but upon objection by the appellant, the respondent had refunded the KPPS payment back to KPPS. The respondent then commenced an action against the appellant to claim the outstanding amount under the first charterparty. In response, the appellant filed a counterclaim premised on the tort of conspiracy to injure with lawful means. The appellant's counterclaim was related to an arrangement between KPPS and the respondent after the conclusion of the second charterparty whereby KPPS had engaged the

A respondent directly to hire the vessels ('the third charterparty'). In relation to this counterclaim, the appellant argued that the respondent and KPPS had colluded to oust the appellant from its business with the respondent and KPPS. At the end of the trial, the High Court found in favour of the respondent and dismissed the appellant's counterclaim. The learned judicial commissioner B ('the LJC') was of the view that s 42 of the Contracts Act 1950 ('the CA') was not applicable for two reasons: (a) there was no basis for KPPS to make the KPPS payment since the appellant did not agree to the split payment arrangement; and (b) the refund by the respondent to KPPS was genuine refund. The issues for the court's determination in the present appeal were: C (i) whether s 42 of the CA was applicable to the facts of the present case; and (ii) whether there was tort of conspiracy to injure by lawful means.

Held, dismissing the appellant's appeal against the High Court's decision in allowing the respondent's main claim and in dismissing the appellant's D counterclaim and affirming the High Court's order with costs of RM20,000 to the respondent:

(1) **(per Hadhariah Syed Ismail JCA, majority)** It was trite that the purpose of s 42 of the CA was to ensure that if a promisee had accepted E the performance of a contractual obligation by a stranger to the contract, the promisee could not be unjustly enriched by 'double satisfaction' of the same contractual obligation by insisting the promisor to perform the same contractual obligation. Whilst it was true that an agreement was not a pre-condition for s 42 of the CA to apply, it nevertheless had been the F practice adopted by the court when dealing with s 42 to look into whether there was an agreement for a third party to take over and discharge the promisor's obligation. If there was an agreement, what were the terms agreed upon and whether there was actual and full performance by the third party before deciding whether s 42 applied or not (see G paras 46 & 55).

(2) **(per Hadhariah Syed Ismail JCA, majority)** At the tripartite meeting, the respondent and KPPS genuinely believed the appellant agreed to the split payment arrangement. But when the appellant made it clear that it did not agree to the split payment arrangement, the respondent did not H want any further complication and so refunded the KPPS payment back to KPPS. With the refund, all three parties were back to the pre-tripartite agreement and so the respondent could look to the appellant for payment of the balance debt owing under the first charterparty. Likewise, the appellant, in turn could claim against KPPS for the debt owing by KPPS I to the appellant under the second charterparty. For the above reasons, the court was of the view that the LJC was not plainly wrong in holding s 42 of the CA did not apply in the circumstances of this case where parties had made the arrangement on payments via the tripartite agreement and later agreed to resile from it (see paras 57–58 & 60).

(3) **(per Hadhariah Syed Ismail JCA, majority)** The court agreed with the LJC that the tort of conspiracy to injure was not established. The events leading to the termination of both the first charterparty and the second charterparty arose as a result of the appellant's continuous default of payments to the respondent. If the appellant did not want to be ousted from both charterparties, all the appellant needed to do at the tripartite meetings was to inform the respondent and KPPS that it would settle its debt with the respondent after it had received payment from KPPS so as not to jeopardise both charterparties. Given the circumstances, the respondent was justified in deciding not to renew the first charterparty. Likewise, KPPS had no choice but to oust the appellant from the second charterparty because the appellant could no longer charter the vessels from the respondent to provide the services required by KPPS. Therefore, KPPS's decision to enter into the third charterparty for one month was the prerogative of KPPS for the benefit of KPPS. In the circumstances, there was nothing wrong in the KPPS's and the respondent's conduct in ousting the appellant. Their conducts only showed this was the only reasonable solution to resolve the impasse faced by KPPS (see paras 70–71).

(4) **(per Gunalan Muniandy JCA, dissenting)** the LJC erred in failing to judicially appreciate the clear and unambiguous terms of s 42 of the CA and to consider that in principle the respondent was estopped from pursuing the present claim against the appellant as the debt then owing by the appellant to the respondent had been fully extinguished by the full settlement of the same by the third party, KPPS. In other words, the promise had been fully performed by the promisor and the promisor was absolved of any further liability to the respondent. There was unequivocal acceptance by the respondent. Consent of the promisor to the performance and/or the need for a basis or agreement for the performance by the third party (KPPS) of the promisor's contractual obligation were plainly not requirements under s 42 of the CA that must be satisfied for s 42 to be successfully invoked (see paras 63–65 & 75–78).

[Bahasa Malaysia summary

Responden ialah pemilik bagi kapal 'Toll Suralaya' dan bot tunda 'Whale 7' ('kapal-kapal tersebut'). Responden dan perayu telah memasuki perjanjian sewa menyewa kapal ('perjanjian sewa menyewa kapal yang pertama') untuk penyewaan kapal-kapal responden. Perayu kemudiannya memasuki perjanjian sewa menyewa kapal yang lain ('perjanjian sewa menyewa kapal yang kedua') dengan KP Port Services ('KPPS') untuk sewaan kapal-kapal yang sama oleh KPPS. Masalah timbul apabila perayu gagal membuat bayaran yang berkaitan kepada responden di bawah perjanjian sewa menyewa kapal yang pertama terutamanya disebabkan oleh kegagalan KPPS membuat bayaran yang berkaitan kepada perayu di bawah perjanjian sewa menyewa kapal yang kedua.

Selepas beberapa mesyuarat, responden, KPPS dan perayu telah bersetuju dengan pengaturan pembayaran berpecah ('perjanjian tiga pihak') di mana KPPS akan membayar terus kepada responden wang yang terhutang oleh perayu kepada responden dan baki bayaran yang perlu dibayar di bawah perjanjian sewa menyewa kapal yang kedua akan dibayar kepada perayu. Berdasarkan perjanjian tiga pihak tersebut, responden telah menerima jumlah tertunggak penuh daripada KPPS ('bayaran KPPS') tetapi setelah dibantah oleh perayu, responden telah memulangkan semula bayaran KPPS kepada KPPS. Responden kemudiannya memulakan tindakan terhadap perayu untuk menuntut jumlah tertunggak di bawah perjanjian sewa menyewa kapal yang pertama. Sebagai tindak balas, perayu memfailkan tuntutan balas berdasarkan tort konspirasi untuk mencederakan dengan cara yang sah. Tuntutan balas perayu adalah berkaitan dengan pengaturan antara KPPS dan responden selepas tamatnya perjanjian sewa menyewa kapal yang kedua di mana KPPS telah berurusan dengan responden secara langsung untuk menyewa kapal-kapal tersebut ('perjanjian sewa menyewa kapal yang ketiga'). Berhubung dengan tuntutan balas ini, perayu berhujah bahawa responden dan KPPS telah bersekongkol untuk menyingkirkan perayu daripada perniagaannya dengan responden dan KPPS. Pada akhir perbicaraan, Mahkamah Tinggi membuat keputusan yang memihak kepada responden dan menolak tuntutan balas perayu. Pesuruhjaya kehakiman yang bijaksana ('PKB') berpendapat bahawa s 42 Akta Kontrak 1950 ('AK') tidak terpakai atas dua sebab: (a) tiada asas untuk KPPS membuat bayaran KPPS memandangkan perayu tidak bersetuju dengan pengaturan bayaran berpecah tersebut; dan (b) bayaran balik oleh responden kepada KPPS adalah bayaran balik yang ikhlas. Isu-isu untuk penentuan mahkamah dalam rayuan ini ialah: (i) sama ada s 42 AK adalah terpakai kepada fakta kes ini; dan (ii) sama ada terdapat tort konspirasi untuk mencederakan melalui cara yang sah.

Diputuskan, menolak rayuan perayu terhadap keputusan Mahkamah Tinggi yang membenarkan tuntutan utama responden dan menolak tuntutan balas perayu, dan mengesahkan perintah Mahkamah Tinggi dengan kos sebanyak RM20,000 diberikan kepada responden:

(1) **(oleh Hadhariah Syed Ismail HMR, majoriti)** Telah menjadi undang-undang yang mantap bahawa tujuan s 42 AK adalah untuk memastikan bahawa jika penerima janji telah menerima pelaksanaan tanggungjawab kontrak oleh orang yang tidak berkaitan dengan kontrak, penerima janji tidak boleh diperkaya secara tidak adil dengan 'double satisfaction' kewajipan kontrak yang sama dengan mendesak pihak yang berjanji untuk melaksanakan tanggungjawab kontrak yang sama. Walaupun benar bahawa perjanjian bukanlah pra-syarat bagi pemakaian s 42 AK, namun ia telah menjadi amalan yang diterima pakai oleh mahkamah apabila berurusan dengan s 42 untuk melihat sama ada terdapat perjanjian untuk pihak ketiga mengambil alih dan menunaikan

kewajipan pemberi janji. Jika terdapat perjanjian, apakah terma yang dipersetujui dan sama ada terdapat pelaksanaan yang sebenar dan penuh oleh pihak ketiga sebelum memutuskan sama ada s 42 terpakai atau tidak (lihat perenggan 46 & 55).

(2) **(oleh Hadhariah Syed Ismail HMR, majoriti)** Pada mesyuarat tiga pihak tersebut, responden dan KPPS benar-benar percaya bahawa perayu bersetuju dengan pengaturan bayaran berpecah tersebut. Tetapi apabila perayu menyatakan dengan jelas bahawa ia tidak bersetuju dengan pengaturan bayaran berpecah tersebut, responden tidak mahu apa-apa permasalahan yang lain dan seterusnya mengembalikan semula bayaran KPPS kepada KPPS. Dengan bayaran balik tersebut, ketiga-tiga pihak telah kembali kepada sebelum perjanjian tiga pihak tersebut dan oleh itu responden boleh meminta perayu untuk pembayaran baki hutang di bawah perjanjian sewa menyewa kapal yang pertama. Begitu juga perayu, seterusnya boleh menuntut terhadap KPPS untuk hutang yang terhutang oleh KPPS kepada perayu di bawah perjanjian sewa menyewa kapal yang kedua. Atas sebab-sebab di atas, mahkamah berpendapat bahawa PKB tidak secara jelas salah dalam memutuskan s 42 AK tidak terpakai dalam keadaan kes ini di mana pihak-pihak telah membuat pengaturan pembayaran melalui perjanjian tiga pihak dan kemudiannya bersetuju untuk berundur daripadanya (lihat perenggan 57–58 & 60).

(3) **(oleh Hadhariah Syed Ismail HMR, majoriti)** Mahkamah bersetuju dengan PKB bahawa tort konspirasi untuk mencederakan tidak dibuktikan. Peristiwa yang membawa kepada penamatan kedua-dua perjanjian sewa menyewa kapal yang pertama dan kedua timbul akibat keingkaran berterusan perayu dalam pembayaran kepada responden. Sekiranya perayu tidak mahu disingkirkan daripada kedua-dua perjanjian sewa menyewa kapal tersebut, apa yang perlu dilakukan oleh perayu pada mesyuarat tiga pihak tersebut adalah memaklumkan kepada responden dan KPPS bahawa ia akan menjelaskan hutangnya dengan responden selepas ia menerima bayaran daripada KPPS supaya tidak memudaratkan kedua-dua perjanjian sewa menyewa kapal tersebut. Berdasarkan keadaan tersebut, keputusan responden untuk tidak memperbaharui perjanjian sewa menyewa kapal yang pertama adalah wajar. Begitu juga, KPPS tidak mempunyai pilihan selain menyingkirkan perayu daripada perjanjian sewa menyewa kapal yang kedua kerana perayu tidak lagi boleh menyewa kapal daripada responden untuk menyediakan perkhidmatan yang diperlukan oleh KPPS. Oleh itu, keputusan KPPS untuk memasuki perjanjian sewa menyewa kapal yang ketiga selama satu bulan adalah hak prerogatif KPPS untuk kepentingan KPPS. Dalam keadaan tersebut, tidak ada yang salah dalam kelakuan KPPS dan responden dalam menyingkirkan perayu. Tingkah laku mereka hanya menunjukkan bahawa ini adalah satu-satunya penyelesaian yang munasabah untuk menyelesaikan kebuntuan yang

dihadapi oleh KPPS (lihat perenggan 70–71).

(4) **(oleh Gunalan Muniandy HMR, menentang)** Pesuruhjaya kehakiman yang bijaksana terkhilaf kerana gagal untuk menghargai terma yang terang dan jelas dalam s 42 AK dan untuk mengambil kira bahawa pada dasarnya responden telah dihalang daripada meneruskan tuntutan semasa terhadap perayu kerana hutang yang terhutang oleh perayu kepada responden telah dipadamkan sepenuhnya oleh penyelesaian penuh hutang tersebut oleh pihak ketiga, KPPS. Dalam erti kata lain, janji telah dilaksanakan sepenuhnya oleh pihak yang berjanji dan pihak yang berjanji telah dibebaskan daripada apa-apa liabiliti selanjutnya kepada responden. Terdapat penerimaan yang tidak berbelah bahagi oleh responden. Persetujuan pemberi janji kepada pelaksanaan dan/atau keperluan untuk asas atau persetujuan bagi pelaksanaan kewajipan kontrak pemberi janji oleh pihak ketiga (KPPS) secara jelas bukanlah keperluan di bawah s 42 AS yang perlu dipenuhi bagi memastikan s 42 boleh diguna pakai (lihat perenggan 63–65 & 75–78).]

Cases referred to

Chong Hee v Credit Corp (M) Bhd [1999] MLJU 456, HC (refd)
Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797; [2016] 3 CLJ 676, CA (refd)
Punj Llyod Sdn Bhd v Ramo Industries Sdn Bhd & Anor and another case [2019] 11 MLJ 574, HC (refd)
V Veeriah v General Manager, Keretapi Tanah Melayu [1974] 1 MLJ 201 (refd)
Wasco Lindung Sdn Bhd v Lustre Metals & Minerals Sdn Bhd [2015] 9 MLJ 610, HC (refd)

Legislation referred to

Contracts Act 1950 s 42
Evidence Act 1950 s 115

Appeal from: *TM Global Marine Sdn Bhd (formerly known as Smart Work Co-Ordinating Sdn Bhd) v Thermatek Sdn Bhd* [2022] 9 MLJ 641 (High Court, Kuala Lumpur)

Manmohan Singh Kang (with Sunshine Devan) (Kang & Kang) for the appellant.
Jeremy M Joseph (with Vinodhini Benjamin and Matthew Van Huizen) (Joseph & Partners) for the respondent.

Hadhariah Syed Ismail JCA (delivering majority judgment of the court):

INTRODUCTION

[1] The dispute between the parties in this appeal relates to payment of outstanding balance of charter hire due and owing by the appellant to the respondent. The appellant never deny its debt to the respondent.

[2] The respondent received full payment of the appellant's debt from the third party, KP Port Services ('KPPS payment'). Upon objection by the appellant to the KPPS payment, the respondent refunds the KPPS payment to KPPS.

[3] When the respondent sued the appellant for the debt due and owing, the appellant contended their debt to the respondent had been discharged with the KPPS payment pursuant to s 42 of the Contracts Act 1950.

[4] The appellant counterclaim against the respondent for various head of damages, purportedly on the basis the respondent and KPPS had colluded to oust the appellant from its business with the respondent and KPPS. The counterclaim is grounded on the tort of conspiracy to injure with lawful means.

[5] The High Court found in favour of the respondent and dismissed the appellant's counter claim. Hence, this appeal.

[6] This appeal raised two main issues as follows:

(a) whether s 42 of the Contracts Act 1950 applies to the facts of this case; and

(b) whether there was tort of conspiracy to injure by lawful means as alleged by the appellant.

BACKGROUND FACTS

[7] The respondent are the disponent owners of the vessels 'Toll Suralaya' and tugboat 'Whale 7' ('the vessels').

[8] The dispute on payments of charter hire involves two separate and distinct charterparty contract. They are as follows:

(a) TMG — Thermatek: Charterparty

By a BIMCO Supplytime 2017 Time Charter Party to Offshore Support Vessels dated 17 May 2018, TMG chartered the vessels to Thermatek for a minimum period of hire of three months commencing 18 May 2018 at

a charter rate of USD7000 per day for one Floating Crane Barge (Toll Suralaya) and USD50,000 per month for the Tugboat ('Whale 7') subject to terms and conditions contained therein; and

(b) Thermatek-KP Port Services Sdn Bhd ('KPPS') Charterparty:

By a BIMCO Supplytime 2017 Time Charter Party for Offshore Support Vessels dated 18 May 2018, Thermatek chartered the vessels to KPPS for a hire period of one month with monthly extension at a monthly charter rate of RM1.6m for both vessels.

[9] At the material time, the respondent knew that the appellant chartered the vessels from the respondent for the sole purpose of performing its obligations to KPPS under a letter of appointment dated 14 May 2018 for provision of dry bulk cargo discharging services from vessels to bargers using the vessels at the Kuantan Port berths ('KPPS contract').

[10] Likewise, KPPS knew the vessels were chartered by the appellant from the respondent.

[11] What happened thereafter was the appellant failed to pay the charter hire due and payable under the TMG-Thermatek charterparty from the start ie for May to August 2018 despite reminders and requests by the respondent. The appellant never denied it is indebted to the respondent. Although the appellant disputed the amount claimed by the respondent, but they did not prove what is the actual amount they owed to the respondent. The only reason given by the appellant for not paying the respondent is because they did not receive payment from KPPS.

[12] It is not disputed that at the material time, KPPS was indebted to the appellant under the Thermatek-KPPS charterparty.

[13] The respondent was in a quandary because they too had monthly payment obligations to the vessels registered owners to meet. They could have terminated the TMG-Thermatek charterparty, but since it was due to expire on 17 August 2018, they thought it better to explore the opportunity of an amicable resolution between KPPS, the respondent and the appellant.

[14] The respondent decided to bring KPPS into this resolution process because if the payment issue is not resolved and the vessels are suspended from work, KPPS would be directly impacted as work on the KPPS contract would stop. The very purpose of the back to back charterparties was for the benefit of KPPS.

[15] So, the respondent sent an email on 27 July 2018 to the appellant and KPPS requesting for a meeting on 30 July 2018 to resolve the payments issue.

[16] At the meeting on 30 July 2018, only KPPS and the respondent's representative were present. The appellant's representative, En Roslan (DW1) was not present. The meeting was then adjourned to 6 August 2018.

[17] At the meeting on 6 August 2018 ('the first meeting') in the presence of En Roslan from the appellant; Captain Malim from the respondent and Mr Wong of KPPS, the following matters were discussed:

(a) KPPS informed that they required the vessels to continue provision of the services under the KPPS contract until 18 September 2018;

(b) since the appellant was already in default of charter hire under the TMG-Thermatek charterparty and duly acknowledged by the appellant, the respondent made clear its position that until and unless the respondent was paid the outstanding hire under its Charterparty, it was not prepared to continue to charter the vessels;

(c) but, the appellant was not financially able and prepared to settle the outstanding charter hire;

(d) so, the respondent asked the appellant, since they are unable to settle the outstanding hire, would they have any objection to the extension of the contract from 18 May 2018 to 18 September 2018 be given directly to the respondent on the same terms;

(e) the appellant did not express any objections but agreed to this arrangement;

(f) accordingly, KPPS instructed for a new charterparty between the respondent and KPPS to be prepared;

(g) as for the Thermatek-KPPS charterparty, KPPS acknowledged the debt due to the appellant and agreed to pay the debt in full; and

(h) with the new charterparty between the respondent and KPPS from 18 August 2018 to 18 September 2018, the Thermatek-KPPS charterparty was agreed to be ended on 18 August 2018.

[18] Despite the first meeting, the appellant say KPPS still refused to pay them and therefore they could not pay the respondent. In view of the continued non-payment, on 13 August 2018, the respondent issued a stop work order against the appellant until the outstanding hire is paid in full.

[19] On 13 August 2018, KPPS called for a meeting with the respondent and the appellant on 15 August 2018 to resolve the stop work order and issue of non-payment.

[20] At the Meeting on 15 August 2018, the parties decided as follows:

(a) KPPS confirmed the sum of RM1,960,178.76 being the sum due and owing by KPPS to the appellant under the Thermatek-KPPS charterparty (debt due to the appellant);

(b) KPPS acknowledged that this sum was still not paid and agreed to pay the appellant this amount;

(c) after discussion between the respondent and the appellant, it was agreed that there was a sum of RM1,694,593.85 being the balance sum due and owing by the appellant to the respondent (debt due to the respondent); and

(d) since the appellant owes the respondent under their charterparty and KPPS owes the appellant under their charterparty, KPPS proposed that the debt due to the appellant be split between what was owed to the respondent (under the TMG-Thermatek charterparty) and the appellant (under the Thermatek-KPPS charterparty) and paid to the parties proportionately (the split payment arrangement).

[21] The split payment arrangement proposal was motivated by the very nature of the arrangement, that is the appellant's role as contractor under the KPPS contract was merely to make available the vessels for the services. Therefore, any benefit that the appellant derived from this arrangement would be the difference between what it earned from KPPS under the Thermatek-KPPS charterparty and what it paid to the respondent under the TMG-Thermatek charterparty.

[22] After the second meeting, KPPS sent a letter dated 20 August 2018 to the appellant setting out the purported discussions and decisions in the meeting for confirmation of all parties. In the 20 August 2018 letter, KPPS stated that the appellant was due RM1,960,178.76 and of this, RM1,694,593.85 was due and owing from the appellant to the respondent. That KPPS intended to pay directly to the respondent the said sum of RM1,694,593.85 and the balance sum of RM265,584.90 will be paid to the appellant.

[23] The appellant did not agree to the split payment arrangement and hence did not confirm/approve the matters set out in the 20 August 2018 letter.

[24] On 20 August 2018, KPPS prepared two cheques for the collection of the appellant and the respondent:

(a) a cheque for RM1,694,593.85 for the respondent; and

(b) a cheque for RM265,584.90 for the appellant.

[25] The respondent collected its cheque on 20 August 2018 and thus received the payment of RM1,694,593.85 from KPPS (the KPPS payment). The appellant on the other hand, did not collect its cheque.

[26] On 25 August 2018, the appellant wrote to KPPS stating they never agreed to the split payment arrangement and that the sum due to them under the Thermatek-KPPS charterparty should be paid to them directly.

[27] When the appellant insist on full payment directly from KPPS, the respondent was aware that there was no longer an agreement for a split payment arrangement; that the payment received from KPPS was uncertain and that KPPS cannot pay the appellant unless the respondent refunded the KPPS payment to KPPS.

[28] Therefore, the respondent decided to preserve its rights under the TMG-Thermatek charterparty pending resolution of this payment issue and instructed their solicitor to issue a letter of demand on 20 September 2018 to the appellant demanding payment the sum of RM1,608,301.29.

[29] The appellant's solicitors responded to the letter of demand via a letter dated 9 October 2018 stating, among other things, that the respondent had already been paid by KPPS and therefore had no right to claim a debt from the appellant.

[30] Eight months later, on 24 April 2019, the respondent returned the payment of RM1,694,593.85 in full to KPPS through its solicitors, Messrs HL Lee & Co and were duly acknowledged receipt by KPPS solicitors on the same day.

[31] The letter from M/S Joseph & Partners to M/S HL Lee & Co dated 24 April 2019 states:

> Return of RM1,694,593.85 paid pursuant to a Time Charter Contract dated 18 May 2018 between KP Port Services Sdn Bhd and Thermatek Sdn Bhd.

[32] M/S Joseph & Partners letter to the appellant's solicitors, M/S Kang & Kang dated 6 May 2019 states:

A Without prejudice to the foregoing, we wish to place on record that our Clients have returned the said sum of RM1,694,593.85 in full to KPPS on 24 April 2019.

B **[33]** The respondent returned the KPPS payment about eight months later because during this time, the appellant had commenced arbitration proceedings in April 2019 against KPPS on its claim in full under the Thermatek-KPPS charterparty. This necessitated without prejudice negotiations between the parties regarding the KPPS payment.

C **[34]** Around May 2019, KPPS fully paid all sums due and payable to the appellant under the Thermatek-KPPS charterparty.

D **[35]** However, the appellant refused to pay the respondent on the ground the debt due to the respondent under the TMG-Thermatek charterparty was extinguished the minute the respondent accepted the KPPS payment under the split payment arrangement.

E **[36]** Thereafter, the respondent's solicitors sent a letter dated 6 May 2019 to the appellant, stating that the KPPS payment has been returned in full on 24 April 2019 and therefore, the appellant's debt to the respondent was revived by virtue of this refund. In the same letter, the respondent demand for the balance sum due and owing under the TMG-Thermatek charterparty. There was no response from the appellant.

F **[37]** On 17 March 2020, the respondent commenced this action against the appellant to recover the sum of RM1,608,301.29 being the balance charter hire and late payment interest due and owing under the TMG-Thermatek charterparty.

G **[38]** In its defence to the respondent's claim, the appellant contended:

(a) the appellant's debt under the TMG-Thermatek charterparty was extinguished and discharged when the respondent accepted the KPPS payment pursuant to s 42 of the Contracts Act 1950;

H (b) the refund of the KPPS payment on 24 April 2019 was made without the knowledge and consent of the appellant and cannot in law or in equity revive the alleged debt or claim against the appellant; and

I (c) the respondent was estopped from making any further claims against the appellant under the TMG-Thermatek charterparty as the KPPS payment was a full and final payment in nature.

[39] Instead, the appellant counterclaimed against the respondent for damages ie loss of charterparty fees and hire charges for vessels from 19 August 2018 to 31 May 2019; general damages for loss of goodwill; aggravated and exemplary damages; interest and costs.

[40] The counter-claim was grounded on tort of conspiracy to injure by lawful means wherein the appellant alleged the respondent had conspired with KPPS to injure the appellant by ousting the appellant from both the TMG-Thermatek charterparty and Thermatek-KPPS charterparty; and the respondent and KPPS continue the business of charter hire the vessels until May 2019.

THE HIGH COURT DECISION

[41] Upon analysis of the cases referred to the court and after hearing submission of parties, the learned judicial commissioner ('LJC') held that s 42 of the Contracts Act 1950 does not apply and therefore, there was no discharge of the appellant's debt under the TMG-Thermatek Charterparty.

[42] The LJC was of the view that s 42 is not applicable for two reasons:

(a) there was no basis for KPPS to make the KPPS payment since the appellant did not agree to the split payment arrangement; and

(b) the refund on 24 April 2019 by the respondent to KPPS was genuine refund.

[43] On the estoppel issue, the LJC found the scope of estoppel as defined in s 115 of the Evidence Act 1950 did not apply as the appellant failed to satisfy the seven pre-requisites in *V Veeriah v General Manager, Keretapi Tanah Melayu* [1974] 1 MLJ 201, namely pre-requisites 3, 4, 5 and 7. The court also took into consideration the facts that the appellant never agreed to the split payment arrangement; that the appellant did not rely upon this split payment arrangement and the appellant knew about the refund. These facts show the appellant was fully aware of what was happening. Therefore, the High Court ruled estoppel does not apply.

[44] The LJC dismissed the appellant's counter-claim on being satisfied that the appellant has failed to prove it's case on the balance of probability.

THE MAJORITY DECISION ON THE MAIN CLAIM

[45] Section 42 of the Contracts Act 1950 reads as follows:

A When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

B **[46]** It is trite that the purpose of s 42 of the CA is to ensure that if a promisee has accepted the performance of a contractual obligation by a stranger to the contract, the promisee cannot be unjustly enriched by 'double satisfaction' of the same contractual obligation by insisting the promisor also performs the same contractual obligation: see *Wasco Lindung Sdn Bhd v Lustre Metals & Minerals Sdn Bhd* [2015] 9 MLJ 610.

C

D **[47]** The instant appeal is a peculiar case because there was no agreement between the appellant (promisor) and the respondent (promisee) that KPPS (third party) would assume legal obligation to pay the appellant's debt to the respondent. But, the respondent accepted full performance from KPPS on 20 August 2018. Hence, the appellant says s 42 applies and crystalised on 20 August 2018.

E **[48]** Learned counsel for the appellant took the position that s 42 is plainly worded. It is submitted that the only criterion to apply s 42 is there is full performance by a third party and accepted by the promisee, then the promisor is discharged from its obligation. So, in this case, the appellant argued, although they did not agree to the KPPS payment, s 42 still apply because an agreement for the payment by a third party is not a pre-condition for s 42 to apply. To the appellant, there is no need to impose a condition into s 42 as it is very clear as it stands. Therefore, it is submitted that the LJC has erred in law and in fact in holding s 42 does not apply simply because the appellant did not agree to KPPS payment.

F

G **[49]** It is further submitted that whilst a basis for the KPPS payment may be a relevant consideration as no one would pay RM1.6m for no reason, it is still not a legal requirement for s 42.

H **[50]** In reply, learned counsel for the respondent submitted that s 42 does not apply and the stand taken by the appellant on s 42 is erroneous in law and in fact for the following reasons:

I (a) KPPS payment was a payment arrangement of convenience expedience only to resolve an impasses caused by two existing set of debts which was disrupting operation of the vessels and thus affecting KPPS's business;

(b) KPPS payment was not made pursuant to any agreement that the respondent will not look to the appellant for payment anymore;

(c) the respondent did not agree to look exclusively to KPPS for payment of the debt owed by the appellant under the TMG-Thermatek charterparty;

(d) there was no actual performance by the third party (KPPS) with the full refund of KPPS payment to KPPS; and

(e) the appellant knew about the refund of the KPPS payment, officially around 6 May 2019.

[51] At the High Court, both parties refer the court to the case of *Punj Lloyd Sdn Bhd v Ramo Industries Sdn Bhd & Anor and another case* [2019] 11 MLJ 574 for the proposition that for s 42 of the Contracts Act 1950 to apply, there must be full, actual performance by a third party of the promisor's obligation and also for the proposition that the promisee is not barred from pursuing against the promisor when the third party had only partially performed the obligation of the promisor and the promisee does not intend to discharge the promisor totally and look to the third party exclusively for the discharge of the promisor's obligation. In *Punj Llyod*'s case, the court held s 42 does not apply as there was no agreement by the promisor for the third party to pay the promisee and there was no full performance.

[52] In *Chong Hee v Credit Corp (M) Bhd* [1999] MLJU 456, the High Court held:

> The application of s 42 of the Contracts Act 1950 is very much dependent upon the terms of the agreement between the parties. The mere fact of acceptance by the plaintiffs of the payment of three instalments by a third party cannot by itself attract the application of that section. That payment must be pursuant to an agreement arrived at between the plaintiffs and the defendant and it must be pursuant to a term in that agreement that the plaintiffs would no longer look to the defendant for payment. In any event there must be performance of the obligation to pay the whole sum due by a third party before s 42 can apply (see *Scott & English (M) Sdn Bhd v Foo Thor Lombong Bijih Sdn Bhd & Anor* [1985] 1 MLJ 73), which is not the case here ...

[53] These cases show that the court look into whether there was an agreement to accept the third party's performance in place of the promisor. If there is no agreement, that is the end of the matter. If there is an agreement, the court will consider s 42 and determine whether there is full performance by the third party. If the court finds there is no full performance, s 42 does not apply. In most of the cases cited by parties, s 42 was held not to apply because there was no agreement and no full performance by the third party.

[54] To put matters in its perspective, it is not disputed that the two charterparties are separate and distinct. Both, the appellant and KPPS

A defaulted in their payment under their respective charterparty. The appellant owed the respondent RM1,694,593.85. KPPS owed the appellant RM1,960,178.76. Based on privity of contract, the appellant has every right to insist and demand KPPS to pay RM1,960,178.76 directly to them because that is a debt owed to the appellant under Thermatek-KPPS charterparty. So, B when the appellant objected to KPPS paying RM1,694,593.85 directly to the respondent and subsequently the respondent refunded the said RM1,694,593.85 in full to KPPS and KPPS paid the refunded sums to settle its debt to the appellant, there was no actual performance by KPPS. Section 42 obviously cannot apply. To accede to the appellant's reasoning that s 42 applies C because there was full performance on 20 August 2018 would occasion a serious miscarriage of justice because in actual fact there was no performance with the refund. The appellant's argument that they do not know and do not consent to the refund cannot be true because the respondent's solicitors letter of 6 May 2019 officially informed the appellant's solicitors of the refund. D

[55] Whilst it is true that an agreement is not a pre-condition for s 42 to apply, it nevertheless has been the practice adopted by the court when dealing with s 42 to look into whether there is an agreement for a third party to take E over and discharge the promisor's obligation. As rightly decided by the LJC, payment by third party is not made in vacuum. There must be a basis for the third party to make a payment to the promisee. Therefore, it is only common sense that the court must look first whether there was an agreement between the promisor and the promisee for the third party payment. If there is an F agreement, what are the terms agreed upon and whether there was actual and full performance by the third party before deciding whether s 42 apply or not. In none of the cases cited, the court never say an agreement is a pre-condition to s 42.

G **[56]** The majority is of the view that the third party KPPS would only pay to the respondent with the consent of the appellant for the balance sum still owing by the appellant to the respondent. At that point, there was nothing critical for the third party KPPS to pay direct to the respondent the amount owing by the third party to the appellant. The third party's goods were no longer in jeopardy.

H

[57] At the tripartite meeting, the respondent and KPPS genuinely believed the appellant agreed to the split payment arrangement. But when the appellant made it clear that it did not agree to the split payment arrangement, the respondent did not want any further complication and so refunded the KPPS I payment back to KPPS.

[58] With the refund, all three parties were back to the pre-tripartite agreement and so the respondent could look to the appellant for payment of the balance debt owing under the TMG-Thermatek charterparty. Likewise, the

appellant, in turn could claim against KPPS for the debt owing by KPPS to the appellant under the Thermatek-KPPS charterparty. That is exactly what happen in this case.

[59] In April 2019, the appellant commenced arbitration proceedings against KPPS to claim the sums of RM1,960,178.76 owed to them and was fully settled by KPPS. In March 2020, the respondent brought this action against the appellant.

[60] For the aforesaid reasons, the majority are of the view that the LJC is not plainly wrong in holding s 42 of the Contracts Act 1950 does not apply in the circumstances of this case where parties had made the arrangement on payments via the tripartite agreement and later agreed to resile from it.

[61] Justice Lee Swee Seng has approved the draft of this judgment and has expressed his agreement with it. We (the majority) would respectfully dismiss the appeal of the appellant with respect to the main claim with costs of RM20,000 to the respondent and the order of the High Court is affirmed.

THE MINORITY DECISION ON THE MAIN CLAIM

[62] Having duly considered the factual matrix of the case, that is mainly undisputed and the explicitly clear terms of s 42 of the Contracts Act 1950, it is my considered opinion that the finding of the LJC and the decision to allow the respondent's claim against the appellant contains plain error of law and fact.

[63] In essence, the LJC fell into error in failing to judicially appreciate the clear and unambiguous terms of s 42 of the Contracts Act 1950 and to consider that in principle the respondent was estopped from pursuing the present claim against the appellant as the debt then owing by the appellant to the respondent had been fully extinguished by the full settlement of the same by the third party, KPPS.

[64] In other words,the promise had been fully performed by the promisor and the promisor was absolved of any further liability to the respondent.

[65] There was unequivocal acceptance by the respondent.

[66] The appeal on the respondent's main claim is allowed and the order of the High Court set aside. Costs of RM10,000 to the appellant here and below.

A DECISION ON THE COUNTERCLAIM

[67] Based on the case of *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797; [2016] 3 CLJ 676; the LJC correctly states that to succeed in its claim under the tort of conspiracy to injure by lawful means, the appellant must prove the following four elements:

B

(a) a combination or agreement between two or more individuals;

C

(b) an intent to injure;

(c) pursuant to which combination or agreement, and with that intention, certain acts were carried out; and

(d) resulting loss and damage to the claimant.

D

[68] The facts and circumstances relied upon by the appellant to satisfy the above four elements can be summarised as follows:

(a) the respondent and KPPS have been involved in discussions to the exclusion of the appellant from as early as 27 July 2018, when invites for the meeting on 30 July 2018 were sent, which meeting also went on without the appellant's presence;

E

(b) at the first meeting, the respondent, KPPS and Mr Wong caused the appellant to agree to the extension contract on the condition that the appellant would be paid directly by KPPS. This extension contract was already drafted and finalized for the appellant's review and approval at the first meeting without being discussed or negotiated with the appellant beforehand;

F

G (c) at the second meeting, the respondent and KPPS introduced the split payment arrangement, which the appellant never agreed to;

(d) notwithstanding the appellant's disagreement and express objections to the split payment arrangement, the respondent and KPPS proceeded to attempt to indirectly cause the appellant to agree to the same. But when this failed, the respondent and KPPS surreptitiously executed the KPPS payment without the appellant's knowledge or consent;

H

(e) after executing the KPPS payment, and despite the respondent being in receipt of the full amount owed to it by the appellant under the TMG-Thermatek charterparty, the respondent then issued the letter of demand to the appellant to double claim from the appellant; and

I

(f) without the appellant's consent, the respondent then refunded the KPPS payment to KPPS on 24 April 2019 and attempted to unilaterally reinstate the debt owed by the appellant under the TMG-Thermatek charterparty.

[69] In response, the respondent submitted, the appellant's contention of conspiracy is an assumption and speculation based on the following facts:

(a) the events leading to KPPS directly contracting with the respondent were a result of the appellant's default in making payment to the respondent. The respondent maintains that its insistence on payment of what was due to them under the TMG-Thermatek charterparty was legitimate, lawful and justified. Under the terms of the TMG-Thermatek charterparty, the appellant's obligation to pay charter hire to the respondent was not dependent on payment received from KPPS. That the respondent's right to enforce under the TMG-Thermatek charterparty is not dependent on the performance of Thermatek-KPPS charterparty;

(b) in breach of the terms of the contract, the appellant failed and refused to pay the respondent. The appellant did not have a genuine intention to pay the respondent as it did not take any measures to salvage its commercial position. In fact, the appellant took the stand that it was not going to pay the respondent unless it was first paid by KPPS. The appellant's witness, En Roslan (DW1) gives evidence 'I have no guarantee that KPPS will pay me if the defendant pays the plaintiff first ...' (Q&A No 43 of witness statement);

(c) the appellant was in default of payment from day one, in May 2018, even when Dato Haji Khasbullah (former CEO of KPPS), with whom the appellant claims was prompt in payment, was still in office until 30 June 2018. The May invoice was only paid late in part on 31 May 2018. The June invoice was not paid. Part payments towards May and June invoices were only made in July. In cross-examination, En Roslan (DW1) confirmed that there were sums owing to the respondent since May 2018;

(d) the respondent was fully entitled not to renew the TMG-Thermatek charterparty upon expiry on 17 August 2018 since the appellant was clearly in default. In any event, the appellant did not request to renew the TMG-Thermatek charterparty;

(e) KPPS was also entitled to decide not to renew their charterparty with the appellant. The Thermatek-KPPS charterparty was on a one month basis, with monthly extensions, at the charterer's option. KPPS would not be in a commercially confident position to give the one month extension of the contract (extension contract) to the appellant given that

on 6 August 2018, the appellant was still in default of payments and had not requested any renewal of the TMG-Thermatek charterparty. Therefore, the decision of KPPS to enter into the extension contract directly with the respondent was a wholly commercial deal for KPPS;

(f) the appellant's voluntarily agreeing to withdraw from Thermatek-KPPS charterparty was a commercial decision that the appellant took having evaluated their prospects;

(g) the 15 August 2018 Meeting proposed by KPPS was aimed at resolving the non-payment issue between the appellant and the respondent so as not to disrupt the services of the vessels required by KPPS. To this end, KPPS proposed an expedient arrangement to resolve payment of the two debts whilst preserving the respective rights of the parties, instead of paying the debt due to the appellant in full and leaving it to the appellant to pay the respondent what was due to them. The split payment arrangement provides a solution to the appellant's lack of funds to perform its contractual payment obligation to the respondent;

(h) the refund of the KPPS payment was made in a genuine understanding and legitimate expectation that the appellant will pay the respondent the sums due;

(i) the respondent charter its vessels to KPPS until 19 August 2018 only and not until May 2019 as alleged by the appellant;

(j) the respondent maintains that there is no benefit derived by the respondent and Mr Wong from ousting the appellant as KPPS did not contract with the respondent at a lower charter price. The extension contract was on the same terms as with the appellant; and

(k) there was no evidence to prove the respondent derived an unlawful gain from the extension contract. The extension contract is only for one month (from 19 August 2018 to 18 September 2018). No contract between the respondent and KPPS was produced by the appellant for the duration of 19 August 2018 to 31 May 2019.

[70] After hearing submissions of parties, the LJC concluded the tort of conspiracy to injure as alleged by the appellant has not been made out. This is what His Lordship states at para [170] of the judgment:

> [170] None of those facts or circumstances relied upon by the defendant (appellant) in support of their contentions that the plaintiff (respondent) and Wong of KPPS had conspired with each other to injure the defendant, taken singly or together, justify or support an inference of dishonest participation by the plaintiff and Mr Wong of KPPS to injure the defendant. There was no reliable evidence provided by the defendant on the alleged conspiracy and the scant evidence provided by the defendant on the conspiracy through circumstantial evidence was just not sufficient for the court to draw an inference that it is far more likely and probable that the

actions of the plaintiff were motivated by a conspiracy and intent to replace the defendant in the contractual matrix to enrich itself ...

[71] We agree with the finding of facts of the LJC. It is our considered view that the events leading to the termination of both TMG-Thermatek's Charterparty and Thermatek-KPPS charterparty arose as a result of the appellant's continuos default of payments to the respondent. If the appellant did not want to be ousted from both charterparties, all the appellant needs to do at the tripartite meetings was to inform the respondent and KPPS that it will settle its debt with the respondent after it has received payment from KPPS so as not to jeopardise both charterparties. This, the appellant did not do. Instead, the appellant is only interested in wanting KPPS to settle KPPS's debt directly to them. Given the circumstances, the respondent is justified in deciding not to renew the TMG-Thermatek charterparty. Likewise, KPPS had no choice but to oust the appellant from Thermatek-KPPS charterparty because the appellant can no longer charter the vessels from the respondent to provide the services required by KPPS. Therefore, KPPS's decision to enter into the TMG-KPPS Charterparty (extension contract) for one month is the prerogative of KPPS for the benefit of KPPS. In the circumstances, there is nothing wrong in the KPPS's and the respondent's conduct in ousting the appellant. Their conducts only show this is the only reasonable solution to resolve the impasse faced by KPPS.

[72] In the circumstances, we find the decision of the LJC in dismissing the counterclaim is not plainly wrong. Therefore, we dismiss the appeal and affirmed the decision of the High Court.

Our decision on the counterclaim is unanimous.

(Gunalan Muniandy JCA delivering dissenting judgment of the court):

[73] This appeal essentially turns on issues of law relating to the application of s 42 of the Contracts Act ('the CA') to the peculiar facts of the instant case that was tried at the High Court ('HC').

[74] The appellant contended that the learned judicial commissioner ('LJC') had fallen into plain error in arriving at his decision resulting from a misinterpretation of the terms of s 42 of the CA on the following grounds:

(a) s 42 can stand on its own, irrespective of whether there was an agreement by a promisor (the appellant in this case) for the payment to be made by the third party;

(b) s 42 has a plain and clear meaning as intended by Parliament. If agreement by the promisor was a pre-condition to full performance of the obligation by a third party as accepted by the promisee, the very underlining purpose and intent of s 42 would be rendered superfluous. An agreement is relevant but not a pre-condition to s 42 applying, particularly to the peculiar facts of this case; and

(c) as the appellant's obligation was discharged by the payment from the third party (KPPS), there can be no question of a refund reviving a debt which is a chose in action without the concurrence of the appellant, who was never aware of the refund between the respondent and KPPS.

[75] Having duly considered the factual matrix of the case that is mainly undisputed and the explicitly clear terms of s 42 of the CA, it is my considered opinion that the finding of the LJC and decision to allow the plaintiff/respondent ('R')'s claim against the appellant/defendant ('R') contains plain errors of law and/or fact. In essence, the LJC fell into error in failing to judicially appreciate the clear and unambiguous terms of s 42 of the CA and consider that in principle R was estopped from pursuing the present claim against D as the debt then owing to R by D had been extinguished by the full settlement of the same by KPPS, the third party ('TP'). In other words, the promise had been fully performed hence, the promisor ('D') was absolved of any further liability to R.

[76] Had the LJC read s 42 literally and correctly interpreted its terms, the same should have been invoked to the present facts. In that event, he would have reached a different conclusion as there was unequivocal acceptance without reservation by R of the TP's full performance of the promise. Neither was there any refund to the TP after the said acceptance nor any communication with D until some nine months later when R refunded the sum received unilaterally and commenced the present claim against D who was at the material time not made aware of the refund nor did D concur with the same.

[77] My view is that the above refund even if the payment by the TP was a result of mistake or misinformation it is wholly inconsequential and irrelevant when s 42 of the CA had already come into operation to extinguish the debt in question. The acceptance by R of the full performance of the promise had completely absolved D's any liability.

[78] Consent of the promisor to the performance and/or the need for a basis or agreement for the performance by the TP of the promisor's contractual obligation were plainly not requirements under s 42 of the CA that have to be satisfied for s 42 to be successfully invoked.

[79] In my considered view, it was obviously flawed for the LJC to hold that there was no valid discharge of the appellant's debt under the TMG-Thermatek Charterparty, pursuant to s 42, when the respondent accepted the KPPS payment from the TP, for two main reasons:

(a) there was no basis for KPPS to make the KPPS payment to begin with since the appellant did not agree to the split payment agreement; and

(b) the refund on 24 April 2019 by the respondent to KPPS was a genuine refund under the split payment arrangement.

It is clear to my mind that the above reasons proffered by the LJC are irrelevant considerations for the application of s 42 to the present facts where there was undisputed settlement by the TP of the debt owed.

CONCLUSION

[80] I would therefore, conclude that there are sufficient merits in law and fact in this appeal to warrant our interference to correct the plain error of the LJC. This appeal should therefore be allowed and the decision of the High Court be set aside.

Appellant's appeal against High Court's decision in allowing respondent's main claim and dismissing appellant's counterclaim dismissed; High Court's order affirmed with costs of RM20,000 to respondent.

Reported by Dzulqarnain Ab Fatar